Supreme Court, U.S.
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NO. 83-6141

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

DAVID LEON CHEADLE

Petitioner

V.

THE STATE OF NEW MEXICO

Respondent.

On Petition For Writ of Certiorari
To The Supreme Court of New Mexico

RESPONDENT'S BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

Respondent State of New Mexico pursuant to Supreme Court Rule 34.2, does not deem a statement of the case nor the noted exceptions in the foregoing rule necessary for inclusion in this Brief in Opposition. Petitioner adequately sets out those matters required by Supreme Court Rule 34.1.

SUMMARY OF ARGUMENTS

POINT I: Respondent concedes the decision challenged here does not directly resolve Petitioner's claim of insufficient evidence to support the aggravating circumstance of murder of a witness. Petitioner did not challenge the sufficiency of the other aggravating circumstance found by the jury. Irrespective of Zant v. Stephens, 103 S.Ct. 2733 (1983) and its application by the New Mexico Supreme Court on this issue, Barclay v. Florida, 103 S.Ct. 3418 (1983) answers Petitioner's claim.

Alternatively, this Court may deem it appropriate to remand this issue to the New Mexico Supreme Court for resolution of the evidentiary sufficiency of the aggravating circumstance of murder of a witness and application of the Barclay decision. Respondent does not believe such remand is necessary.

POINT II: The issue of appropriate standards to limit the consideration of the phrase, "the defendant and the crime", has been previously addressed by the Court and requires no further review. Petitioner did not challenge the applicable New Mexico death penalty statute in the state supreme court. Petitioner did not challenge the instruction utilizing the above phrase in the trial court instruction.

POINT III: There is no constitutional requirement to instruct the jury that aggravating circumstances must outweigh mitigating circumstances beyond a reasonable doubt. Petitioner did not raise this claim against the applicable New Mexico statute on direct appeal. Petitioner did not challenge the jury instruction on the weighing process at the instruction conference in the trial court.

POINT IV: The factual context of the proffered defense testimony sought to be immunized was irrelevant in time to that when the offenses were committed. The New Mexico Supreme Court correctly held Petitioner was not denied any constitutional right to present a defense or call witnesses on his behalf by the trial court's refusal to force immunity on his proffered witness. Petitioner did not correctly seek to have his proffered witness immunized.

ARGUMENT

POINT I

Petitioner alleges twofold error by the New Mexico Supreme Court in deciding the issue of sufficient evidence to support one of two aggravating circumstances submitted to the jury. First he alleges the New Mexico Supreme Court deprived him of appellate review by failing to review his sufficiency claim that the aggravating circumstance of murder of a witness was not proven beyond a reasonable doubt. Secondly, that the New Mexico Supreme Court has misconstrued the holding in Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). (Pet. 8-11).

Respondent New Mexico answers that two grounds suffice to deny review of these contentions. First, this Court extended Zant v. Stephens, in Barclay v. Florida, __ U.S. ___, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983) by holding that the consideration of an invalid aggravating circumstance does not render a death sentence constitutionally infirm if otherwise supported by another valid aggravating circumstance(s). Secondly, assuming the New Mexico Supreme Court misconstrued Zant, Barclay is dispositive authority supportive of that Court's decision.

Alternatively, if this Court deems review on the merits of Petitioner's sufficiency claim essential, the Court may remand the decision to the New Mexico Supreme Court for such review and application of Barclay.

Assuming the evidence is insufficient to support the murder of a witness circumstance, Barclay v. Florida, supra would still render the Cheadle opinion to be correctly decided. Whether the New Mexico Supreme Court correctly applied Zant v. Stephens, supra would be irrelevant.

Respondent New Mexico concedes that the New Mexico Supreme Court did not expressly decide his claim of insufficient evidence

to support of one of two aggravating circumstances. Hence, irrespective of the correctness of the New Mexico Supreme Court's interpretation of Zant v. Stephens, supra, this Court may desire to remand this issue to the New Mexico Supreme Court to decide the merits of evidence sufficiency for the aggravating circumstance of murder of a witness. However, remand is unnecessary in view of the holding in Barclay v. Florida, supra. Pending disposition of this issue by the New Mexico Supreme Court, if necessary, there is no basis upon which this Court needs to review the correctness of the New Mexico Supreme Court's interpretation of Zant v. Stephens, supra, in light of Barclay v. Florida, supra.

POINT II

Petitioner asserts the New Mexico Death Penalty Statute is constitutionally infirm for failure to set appropriate standards for jury consideration of the phrase "the Defendant and the crime" in deciding the appropriate sentence. (Petition, 12-15).

This question does not warrant review by this Court. The issue has been adequately addressed by previous decisions and does not need further review. Secondly, Petitioner challenges the New Mexico Death Penalty Statute too late. He did not raise this issue in the New Mexico Supreme Court.

Petitioner admits he did not raise any objection to the phrase "the Defendant and the crime" in the instruction given in the trial court. He further concedes the New Mexico Supreme Court held the issue waived by failure to object. (Pet., 12). Petitioner then changes course and "suggests" that the New Mexico Supreme Court erred in applying a rule of waiver because the attack was "essentially" on the constitutionality of an unspecified statute upon which the instruction was predicated. Respondent assumes the statute to be §31-20A-2B, NMSA 1978. (Appendix A) This contention is clearly incorrect. Petitioner did not attack the constitutionality of any statute upon which the challenged instruction was based on direct appeal.

In the New Mexico Supreme Court, Petitioner challenged N.M.U.J.I. Criminal 39.33, claiming the instruction did not provide clear and objective standards which are rationally reviewable because (1) it instructed the jury to simply weigh aggravation against mitigation without further guidance and (2) its final standard -- "the Defendant and the crime" -- is one of sheer subjectivity. The New Mexico Supreme Court noted that Petitioner raised no objection in the trial court to the instruction challenged on appeal. (Pet.App. Exhibit A, 9-10).

This Court does not generally review claims not raised below. Hankerson v. North Carolina, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1977). There was no issue raised that the New Mexico Capital Felony Act was unconstitutional upon the grounds asserted for the first time in this Court. The failure to raise the statutory contention in the New Mexico Supreme Court forecloses the propriety of any review by this Court. Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 643 (1974).

The matter is inappropriate for review by this Court. Rule 17, Supreme Court Rules.

POINT III

Petitioner next argues the New Mexico Capital Felony Act and the implementing jury instructions are unconstitutional. This is premised upon the assertion that there is no requirement that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. (Pet., 16-18).

Respondent New Mexico answers that there is no constitutional requirement that aggravation outweigh mitigation beyond a reasonable doubt. Secondly, Petitioner did not raise this issue with respect to the applicable New Mexico statute. Finally, Petitioner did not challenge the appliable instruction at the trial court instruction conference prior to submission to the jury.

Petitioner correctly notes this Court's decision in Zant v. Stephens, __ U.S. ___, 103 S. Ct., 2733, 77 L.Ed.2d 235 (1983), holding there is no constitutional requirement for specific weighing standards to guide the jury's consideration of mitigation against aggravation. He contends the New Mexico Supreme Court's reliance on Zant v. Stephens is misplaced. The decisional rationale in Zant v. Stephens is dispositive of his claim here and it does not merit further review by this Court.

The relationship between aggravation and mitigation is clearly and fundamentally simple. The instruction, N.M.U.J.I. Crim. 39.31, provides that the State must prove beyond a reasonable doubt that the mitigating circumstances do not outweigh the aggravating circumstances. To the extent that this may involve proof of a negative proposition, Respondent submits that the application of simple logic resolves any purported ambiguities or uncertainties. To state the standard positively, the jury must find that the aggravating circumstances are equal to or outweigh the mitigating circumstances. Assuming equality

of weight between aggravation and mitigation, the jury's decisional process must then consider two other factors: the defendant and the crime. Section 31-20A-2.B NMSA (1978); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Eddings v. Oklahoma, U.S. 102 S.Ct. 869, 70 L.Ed.2d 1 (1982). How such a process fails to adequately channel the jury's discretion is not made clear by Petitioner.

In any event, this issue was answered in Proffitt v. Florida, 428 U.S. 242, 257-258, 96 S.Ct. 2960, 49 L.Ed.2d 913, 926 (1976), wherein this Court opined:

> While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

The principle enunciated in Proffitt answers the claim made now.

To the extent that Petitioner contends State v. Wood, 648 P.2d 71, 83 (Utah 1982), constitutes support for his argument, he is mistaken. The Utah Supreme Court in Wood considered a statute which contained no burden of proof to either the existence of an aggravating circumstance or the balance of proof between aggravating and mitigating circumstances. The Wood court concern was the statute not only failed to assign any weight necessary to find the existence of an aggravating factor but even omitted directions to the jury to compare aggravating and mitigating factors. As the Wood court noted, "the sentencing authority is simply directed by Section 76-3-2072 to 'consider the penalty'." 648 P.2d at 79.

The similar Georgia statute considered and upheld by this Court in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d

859 (1976) undermines any persuasive force State v. Wood, supra, might otherwise have. The Georgia statute and the Utah statute are sufficiently similar to negate any value of the Wood opinion.

The decisions in Proffitt, Gregg, and Stephens dispositively answer the contentions presented by petitioner. The issue does not merit review by this Court. Rule 17 Supreme Court rules.

Secondly, Petitioner did not challenge the New Mexico death penalty statute on the grounds now asserted here. He only attacked the insufficiency of the instructions on direct appeal to the New Mexico Supreme Court. (Pet.App. Exhibit A, 9-10; Brief-in-chief, 18-22). This Court will not consider a State statute challenge in the first instance. Fuller v. Oregon, supra.

Finally, Petitioner did not object to any of the instructions at the instruction conference. (Pet.App. Exhibit A, 9-10). This Court generally declines to consider instructional issues not raised in the trial court. Hankerson v. North Carolina, supra.

POINT IV

Petitioner asserts New Mexico Rule of Criminal Procedure 58 extends only to the state the right to seek immunity to compel testimony from a reluctant witness who invokes the 5th Amendment privilege. This is argued to be unconstitutional because it deprives an accused of a similar "right". (Pet. 19-22).

Respondent replies that the decision below gave full consideration to the issue and decided it correctly. Secondly, irrespective of whether the decision below was correct, Petitioner's argument is without merit.

The challenged decision reflects the dispositive basis upon which this Court should decline to further review the matter raised. The evidence in the case conclusively established that the murder of the victim and the attempted rape and kidnapping of another victim occurred during the early morning hours of September 10, 1981. The witness sought to be immunized would have testified that Petitioner slept at his residence on the evening of September 10, 1981.

The suggestion by Petitioner that had his desired witness been immunized, his proferred testimony would have supported, in part, Petitioner's alibi belies the uncontroverted evidence that the offenses occurred numerous hours before this witness could offer any evidence of alibi. As a factual matter, Defendant demonstrates no constitutional violation. For this reason alone, the issue should not be reviewed by this Court.

Petitioner further asserts that because of the limit of Rule 58, his failure to properly proceed in accordance with the rule should be excused because his disentitlement to its benefits rendered compliance futile. He cites no authority to excuse his failure. The Cheadle opinion correctly held that petitioner

failed to properly attempt to immunize his desired witness. (Pet.App. Exhibit A, 6-9).

Moreover, the New Mexico Supreme Court correctly resolved this issue against Petitioner on the basis of the majority rule in the federal circuits concerning the immunity issue.

In summary, those cases have held that immunity is an executive function, not a judicial one. Immunity is a statutory creature and not inherent under the constitutional provisions relied upon by various defendants in those cases. U.S. v. Hunter, 672 F. 815 (10th Cir. 1982); United States v. Turkish, 623 F. 769, 771-779 (2nd Cir. 1980), cert. denied, 101 S.Ct. 856 (1981).

Turkish also analyzed the question of immunity in another light. The Court observed that a criminal prosecution was not, in any sense, a symmetrical proceeding. The prosecution and defense come to trial with substantially different positions. The prosecution necessarily assumes substantial constitutional obligations to establish the defendant's guilt. The defendant has no constitutional obligations. The Turkish court fairly noted the substantial differences in resources.

Nevertheless, that court declined to follow any kind of an equalization theory because of the disparity in investigatory and evidentiary resources. The bottom line analysis of the numerous federal decisions may be characterized in brief as reflecting the important policy considerations to society. The government or state prosecutorial arms must necessarily be afforded the leeway to determine the potential harm of either prosecuting offenders or immunizing potential offenders in order to more effectively prosecute the more dangerous offenders. On the other hand, an accused has only one basic interest: acquittal.

The bottom line principle was also recognized by the only federal case petitioner relies upon. Government of Virgin

Islands v. Smith, 615 F. 2d 964 (3rd Cir. 1980). As correctly observed by the New Mexico Supreme Court, Petitioner did not even meet the requirements set forth in Smith by which to obtain immunity for his potential witness. (Pet.App. Exhibit A, 6-9).

As noted above, the testimony sought to be immunized was not clearly exculpatory or essential to Petitioner's case. The immunity was not correctly sought in the trial court. Finally, Petitioner made no showing that there was an absence of a strong governmental interest which counterveiled against the grant of immunity. Petitioner does not demonstrate that his failure to follow the requirements of the Smith criteria is excusable. This issue does not have a proper factual basis upon which it can be further reviewed.

There is no adequate reason for this Court to review the issue raised. Rule 17, Supreme Court Rules.

CONCLUSION

For the reasons presented, Respondent State of New Mexico respectfully submits that the Petition for Certiorari should be denied.

Alternatively, if the Court deems sufficiency review of the aggravating circumstance of murder of a witness necessary, it should grant the writ and remand the issue to the New Mexico Supreme Court for resolution.

Respectfully submitted,

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ARTICLE 20A

Capital Felony Sentencing

Sec.
31-20A-1. Capital felony; sentencing procedure.
31-20A-2. Determination of sentence.
31-20A-3. Court sentencing.
31-20A-4. Review of judgment and sentence.
31-20A-5. Aggravating circumstances.
31-20A-6. Mitigating circumstances.

31-20A-1. Capital felony; sentencing procedure.

A. At the conclusion of all capital felony cases heard by jury, and after proper charge from the court and argument of counsel, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. In nonjury capital felony cases, the judge shall first consider a finding of guilty or not guilty without any consideration of punishment.

B. Upon a verdict by the jury or judge that the defendant is guilty of a capital felony, or upon a plea of guilty to a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized herein. In a jury trial, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge before the original trial jury. In a nonjury trial the sentencing proceeding shall be conducted as soon as practicable by the original trial judge. In the case of a plea of guilty to a capital felony, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge or by a jury upon demand of a party.

C. In the sentencing proceeding, all evidence admitted at the trial shall be considered and additional evidence may be presented as to the circumstances of the crime and as to any aggravating or mitigating circumstances pursuant to Sections 6 [31-20A-5 NMSA 1978] and 7 [31-20A-6 NMSA 1978] of this act.

D. In a jury sentencing proceeding, the judge shall give appropriate instructions and allow argument and the jury shall retire to determine the punishment to be imposed. In a nonjury sentencing proceeding, or upon a plea of guilty, where no jury has been demanded, the judge shall allow argument and determine the punishment to be imposed.

History: Laws 1979, ch. 150, § 2.

31-20A-2. Determination of sentence.

A. Capital sentencing deliberations shall be guided by the following considerations:

(1) whether aggravating circumstances exist as enumerated in Section 6 [31-20A-5 NMSA 1978] of this act;

(2) whether mitigating circumstances exist as enumerated in Section 7 [31-20A-6 NMSA 1978] of this act; and

(3) whether other mitigating circumstances exist.

B. After weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, the jury or judge shall determine whether the defendant should be sentenced to death or life imprisonment.

History: Laws 1979, ch. 150, § 3.

31-20A-3. Court sentencing.

In a jury sentencing proceeding in which the jury unanimously finds beyond a reasonable doubt and specifies at least one of the aggravating circumstances enumerated in Section 6 [31-20A-5 NMSA 1978] of this act, and unanimously specifies the sentence of death pursuant to Section 3 [31-20A-2 NMSA 1978] of this act, the court shall sentence the defendant to death. Where a sentence of death is not unanimously specified, or the jury does

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